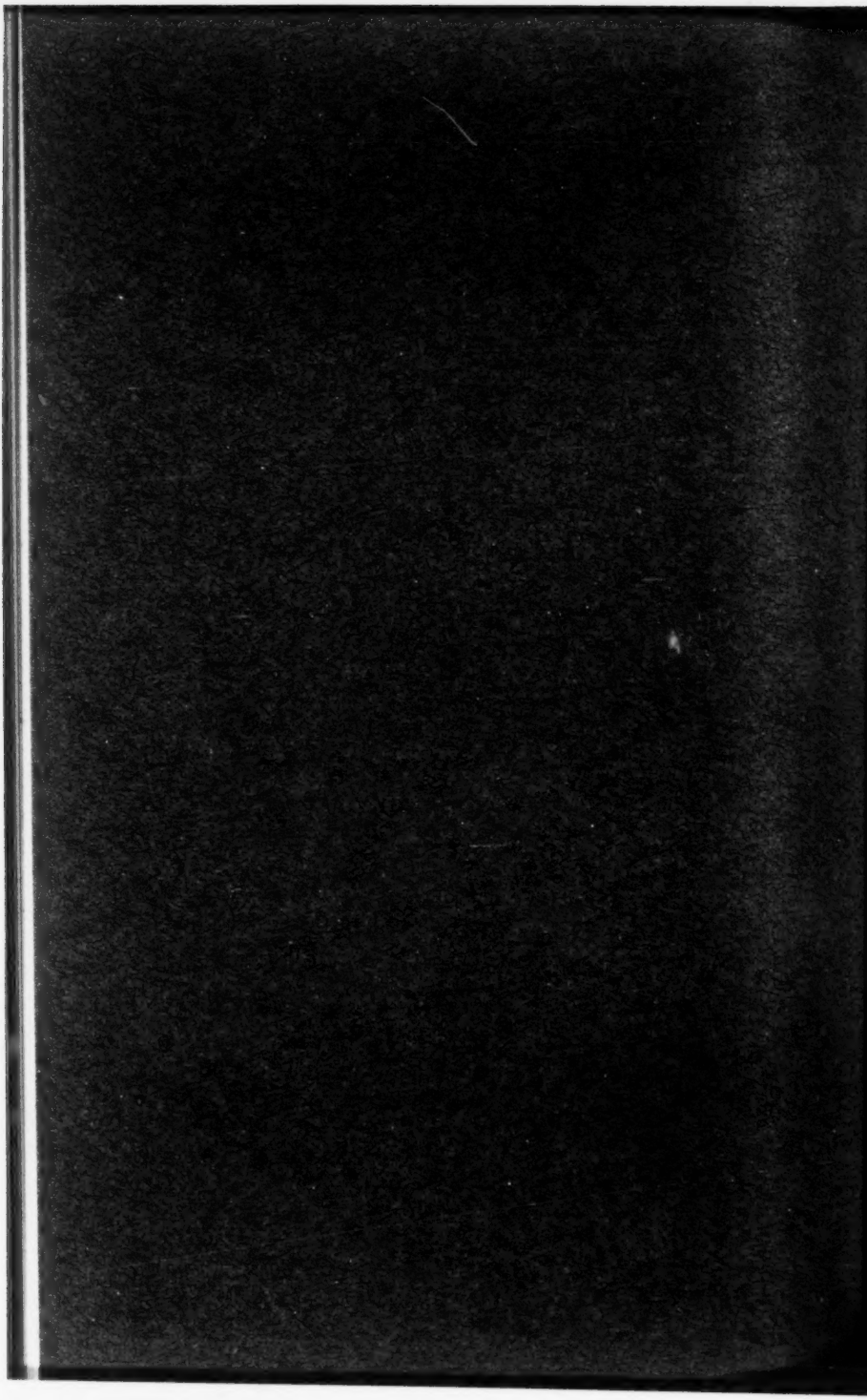

INDEX

CITATIONS

Cases:

555132—43——1

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 357

MARINE ENGINEERS' BENEFICIAL ASSOCIATION, LOCAL NO. 33, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The circuit court of appeals filed no formal opinion. The notation by the court of the authorities it relied upon in dismissing the petition filed by the petitioner in the court below appears in the record at page 45. The action of the Board which petitioner challenges is unreported.

JURISDICTION

The order of the circuit court of appeals (R. 51-52) was entered on June 15, 1943. The peti-

tion for a writ of certiorari was filed on September 15, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTION PRESENTED

Whether a circuit court of appeals is empowered by Section 10 (f) of the National Labor Relations Act to review a determination of the Board refusing to issue a complaint.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*) are set forth in the Appendix, *infra,* pp. 13–17.

STATEMENT

Petitioner, a labor union, filed with the Board a charge of unfair labor practices by an employer (R. 5, 34). The Board issued its complaint based upon petitioner's charge but thereafter withdrew it and refused again to issue a complaint in the matter (R. 8–9, 34). Petitioner thereupon petitioned the Circuit Court of Appeals for the Second Circuit for review of the Board's action in withdrawing its complaint and its refusal to issue a complaint thereafter (R. 1–14). Upon motion by the Board (R. 33–45), the petition was dismissed (R. 45, 51–52).

ARGUMENT

1. The Act, as well as the uniform decisions of this Court and the circuit courts of appeals, make it clear that the power of the Board to issue or to decline to issue a complaint and to withdraw a complaint prior to the holding of a hearing thereon is not subject to judicial supervision. Thus the Act by Section 10 (a) provides:

> The Board is *empowered* * * * to prevent any person from engaging in any unfair labor practice * * * affecting commerce. [Emphasis supplied.]

By Section 10 (b):

> Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board * * * shall have *power* to issue * * * a complaint. [Emphasis supplied.]

Similarly, Section 10 (c) gives the Board "power" to petition any circuit court of appeals for enforcement of its order. Conversely, the statute is quite specific where it imposes an affirmative duty upon the Board. By Section 10 (c) it is provided that testimony taken at a hearing "*shall be* reduced to writing," and if the Board thereafter concludes that an unfair labor practice has been committed:

> * * * then the Board *shall* state its findings of fact and *shall issue* and cause to be served * * * an order * * *

> to cease and desist * * * and to take * * * affirmative action. [Emphasis supplied.]

Similarly, if the Board concludes that no person named in the complaint has engaged in unfair labor practices:

> * * * then the Board *shall* state its findings of fact and *shall* issue an order dismissing the said complaint. [Emphasis supplied.]

The mere grant of power to the Board to act with respect to prevention of an unfair labor practice is not tantamount to the imposition of a duty upon the Board so to act. The grant of power contemplates use of a proper discretion with respect to its employment, and in appropriate cases envisages its nonuse despite the ostensible presence of unfair labor practices. The statute is express in its imposition of duties in other matters; where issuance of complaint is concerned, it does no more than affirm the Board's "power" to do so. This is conclusive against petitioner's contention. *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9, 18; *National Labor Relations Board* v. *Barrett Co.*, 120 F. (2d) 583, 586 (C. C. A. 7).

Petitioner seeks, in effect, to have the courts assume the function of determining in which cases the Board shall initiate or prosecute proceedings. Congress, however, pursuant to its

policy of establishing "division of responsibility" and coordination of functions between the courts and the administrative agencies [1] has, by the provisions of Section 10 (a) and (b), entrusted this purely administrative matter, involving "control [of] the range of investigation," solely to the discretion of the Board.[2] *Federal Communications Comm.* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 142–143.

The Act makes no provision either for the duplication or the supervision of this function by the courts.[3] Such a function, by its very nature,

[1] *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206, 208.

[2] Accordingly, Circuit Courts of Appeals in addition to that of the Second Circuit have uniformly dismissed petitions seeking review of instances of the Board's determination not to issue complaint. *Progressive Mine Workers of America, International Union, affiliated with the A. F. of L.* v. *National Labor Relations Board* (without opinion), 3 Labor Cases Par. 60,133 (App. D. C.); *White* v. *National Labor Relations Board* (without opinion), 9 L. R. R. 506 (App. D. C.); *Anderson* v. *National Labor Relations Board* (without opinion), decided December 8, 1942 (C. C. A. 7). And see *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9, 18; *Jacobsen* v. *National Labor Relations Board*, 120 F. (2d) 96, 100 (C. C. A. 3); *National Labor Relations Board* v. *Barrett Co.*, 120 F. (2d) 583, 586 (C. C. A. 7).

[3] It is noteworthy that paragraphs (e) and (f) of Section 10, insofar as they treat of the reviewing court's decree, authorize only such decree as shall *enforce*, *modify*, or *set aside* the Board's order. They make no provision for a decree of the kind here sought, directing the Board to issue a complaint, hold a hearing thereon, or take any other administrative step leading to issuance of a final order.

is peculiarly within the field which Congress has committed to the Board and similar agencies. *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9, 18.[4] Success or failure in preventing unfair labor practices may depend upon the careful selection, from among hundreds of cases in which action is sought, of those in which proceedings are to be undertaken. Such selection depends upon many factors: e. g., the relative importance of cases, the significance of particular cases or issues, the state of the agency's docket, or its available facilities. Such factors obviously call for final determination by the specialized agency which Congress has made primarily responsible for the Act's enforcement. Such factors are in their nature not reducible to a record, and the Act provides for no record of the proceedings upon which this administrative step is based. In sum, "the course to be pursued rests in the sound discretion of the Board and is the concern of expert admin-

[4] The function and responsibility of the Board, in this respect, are in no way unique in the procedures adopted for the enforcement of public statutes. Thus, a district attorney or other prosecuting official has an unreviewable power to determine whether the facts concerning an alleged violation of law warrant the initiation of a prosecutiton or its continuation, even though his action may have an adverse effect upon a party standing to benefit from the outcome of the proceedings. This is true even in proceedings under a statute conferring benefits upon an informant upon the successful conclusion of the proceedings. *Confiscation Cases*, 74 U. S. 454, 458–459, 463.

istrative policy." *Jacobsen* v. *National Labor Relations Board, supra,* 120 F. (2d) 96, 100 (C. C. A. 3).

To impose upon the courts the duty of supervising these administrative steps would be to subject them to a tremendous burden of litigation,[5] in a field foreign to the "range of their staple business,"[6] and involving matters not of record. Moreover, under petitioner's theory, the determination of such questions of policy would rest ultimately, not with a single administrative agency, but with 11 courts of appeals, forced to proceed upon the prompting of hundreds of private litigants. Such an arrangement would render practically impossible the effective enforcement of the statute on a nation-wide scale. This very fact, as the legislative history shows, was a controlling consideration which led Congress to establish a single Board responsible for the Act's administration. The Senate Committee on Education and Labor, in recommending the provision of the Act creating the Board, pointed out the defects in administration of Section 7 (a) of the National Industrial Recovery Act resulting from division of authority among "a wide variety of

[5] During the fiscal year 1941–42, 755 unfair labor practice cases were, like the instant case, closed by the action of Regional Directors declining to issue a complainant. Seventh Annual Report of the National Labor Relations Board, p. 26.

[6] The *Pottsville* case, 309 U. S. at 142.

independent industrial boards," and stressed the need "to dispel the confusion resulting from dispersion of authority and to establish a single paramount administrative or quasi-judicial authority in connection with the development of the Federal American law regarding collective bargaining."[7]

Petitioner contends that the Act accords rights to it pursuant to which it may compel issuance of a complaint by the Board. However, it is clear that the statute creates no private right of action and that the Board acts purely in the public interest with full discretion to prosecute an appropriate proceeding in violation thereof, or to refuse to do so, or to abandon such a proceeding once begun. *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261; cf. *Federal Trade Comm.* v. *Klesner*, 280 U. S. 19, 25. Petitioner's contention that the Board does not have discretion to forbear proceeding upon charges filed, similar to the discretion admittedly accorded under the Federal Trade Commission Act, but that it is under an unqualified duty to proceed under a duty analogous to that which the Interstate Commerce Act imposes, was previously disposed of by this Court in the *Consolidated Edison* case, *supra*, pp. 268–269. There, this Court explicitly declared that the procedure

[7] S. Rept. No. 573, 74th Cong., 1st Sess., pp. 4–5, 15. Cf. *Williamsport Wire Rope Co.* v. *United States*, 277 U. S. 551, 559–562.

and concomitant rights and duties under the instant statute are analogous to those under the Federal Trade Commission Act, whereas the rights and duties flowing from the Interstate Commerce Act, which were not "drawn in analogy to the Federal Trade Commission Act," are "wholly dissimilar."

2. Petitioner's second contention (Pet. 8, 12–14), that the Board's refusal to issue a complaint is a final order and, as such, reviewable at the instance of a private organization under Section 10 (f), is, we submit, without merit.

We have already noted (*supra,* p. 3) that by Section 10 (b) the Board has "power" to issue a complaint and that this power is not mandatory but discretionary. Issuance of a complaint is not conditional upon any formal requirement such as prior notice, hearing or finding of facts, no record is required to be made showing the basis of the issuance or nonissuance of a complaint, and the Board's action with respect thereto is nowhere characterized as an "order." It is only after a due and formal hearing after answer filed, with the testimony reduced to writing, that the Board, concluding that unfair labor practices have occurred, "shall state its findings of fact and shall issue * * * *an order*" appropriate to the situation. If the Board concludes that no unfair labor practices have occurred, it "shall state its findings of fact and issue *an order* dismissing the

said complaint" (paragraph (b), (c)). [Emphasis supplied.] [8]

Having thus provided for the issuance of "an order" upon the basis of a complaint, answer, testimony, and findings, and having used the term in no other sense, the section then authorizes the Board to petition an appropriate court for the enforcement of *"such order"* (paragraph (e)), and provides that a "person aggrieved by *a final order of the Board* granting or denying * * * the relief sought" may obtain a review thereof (paragraph (f)). [Emphasis supplied.] Both paragraphs further make clear the type of order to which they refer by requiring, as a prerequisite to the court's jurisdiction, the filing of a transcript of the record "including the pleadings and testimony upon which" the order "was entered and the findings and order of the Board." See *Matter of Petition of National Labor Relations Board,* 304 U. S. 486. Finally, the provision of both paragraphs (e) and (f) that "the findings of the Board as to the facts, if supported by evidence, shall be conclusive" affords further confirmation that these review provisions apply only to orders based on findings of fact.

The manner in which the term "order" is employed in the statute makes it clear that only a

[8] Paragraph (d), empowering the Board to modify or set aside "any finding or order," can refer only to orders issued under paragraph (c) after a hearing, since the amendment of complaints is elsewhere separately provided for (Section 10 (b)).

formal conclusion, as a judicial act, based upon a full record, is being referred to, and not an initial informal administrative decision whether or not to proceed upon a charge by issuance of complaint. Compare *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401, 406–409; *Federal Power Comm.* v. *Metropolitan Edison Co.*, 304 U. S. 375, 384, 387. The two determinations are not alike. *National Labor Relations Board* v. *Barrett Co.*, 120 F. (2d) 583, 586 (C. C. A. 7). The statutory intent is all the more unmistakable from the practical consideration that the judicial review for which the Act provides, based on a record including testimony and findings, would be impossible of application to such an administrative determination by the Board, a determination based on no hearing, testimony or findings, nor upon any proceedings which the statute makes a matter of record.[9] The petition herein contains no indication as to what record is the basis of the review sought; the Act provides for no such record.

3. We do not agree with petitioner's third contention (Pet. 8, 14) that the case is one of first impression and the first to be brought before this Court under Section 10 (f).

This Court has made it sufficiently plain in previous decisions that the Board may, in its

[9] As hereinbefore noted, the considerations upon which such a determination is made are, by their nature, not reducible to a record.

sound discretion, refuse to proceed in enforcement of the public rights created by the statute; further pronouncement on this Court's part is unnecessary. *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9; *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261; cf. *Federal Trade Comm.* v. *Klesner*, 280 U. S. 19.

The appropriate law is well understood and has been uniformly applied by Circuit Courts of Appeals in accordance with the rulings of this Court.

The case presents no question which this Court has not previously determined. The petition should, therefore, be denied.

Respectfully submitted,

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OCTOBER 1943.